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JAMES H. McKENNEY,
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No. 454

Br. of Warburton for Resp't.

Filed Nov. 20, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 454

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

TINE COHEN, DEFENDANT IN ERROR.

Brief Opposing Petition for a Writ of Certiorari.

S. WARBURTON,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-20-'99

IN THE

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OCTOBER TERM, 1899.

No.

MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

TINE COHEN, DEFENDANT IN ERROR.

The points discussed and the reasons given why the application for the writs of certiorari should be denied are fully set forth in the briefs filed in the cases of Ins. Co. *vs.* Hill and Ins. Co. *vs.* Sears, to which we respectfully refer the court and ask it to consider those briefs as the brief in this case. We only wish to say in addition that the two alleged defenses of estoppel and waiver are not made in this. The company does not claim to have served the statutory notice. It does not claim there was any subsequent waiver of the statutory notice. It does not claim Mr. Cohen or the beneficiary ever did or said anything that could be construed a waiver of their rights under the contract. They admit the issuance of the policy and the payment of 7½ years' premiums, and all the facts which make the policy a New York contract. Do not pretend to have served the statutory notice. There is one other point we wish to call to the court's attention.

Mr. Cohen took out his policy on the 10th day of June, 1885, and paid seven and one-half years' premiums, but failed to pay the semi-annual premium on December 10, 1892. It will be noticed the policy is a semi-endowment twenty-year policy. The premiums are very heavy and the reserve is correspondingly large. This reserve, if used to purchase extended insurance under the New York statute, would carry the policy for its full face for at least thirteen years and 130 days, the company still retaining as forfeited all dividends and one-third of the reserve (Flitcraft's Manual Life Insurance, page 1895 Ed., Missouri statutes and New York being practically the same). This would have continued Mr. Cohen's policy of three thousand dollars in full force and effect until about May, 1906, or nine years beyond his death, although having paid his full share of expenses of the company and the company still forfeiting, as it legally may do under the statutes, one-third of the reserve and all the dividends and accumulations on the policy, or Mr. Cohen could have surrendered his policy under the New York statute six months after he had been put in default by service of the statutory notice and received a paid-up policy for over one thousand dollars, payable at his death.

But the company did not serve the notice and the policy was not forfeited, so it was never necessary for Mr. Cohen to surrender the policy and obtain a new one either for paid-up or extended insurance. He could delay surrendering the policy until fully six months after the service of the statutory notice. He had the thirty days after the service of the notice to elect to make further payments and six months after the termination of the thirty days to elect whether he would take paid-up or extended insurance.

The judgment below was for a few dollars over $2,700. The decision of the lower court was right. No rea-

son of any character can be shown why the defendant in error in order to sustain a judgment of $2,700 should, after having litigated the case through the final court, save in exceptional cases, be to the further expense and trouble of litigating it here. The expenses of a trial at home and at San Francisco she was compelled to meet. She is compelled to be at the expense of resisting this application. Shall she be compelled to still go to the additional expense of trying it here? Where will her judgment of $2,700 be if all this additional expense is forced upon her? A large part in the necessary expenses of such protracted litigation.

We believe the decision of the lower court was right, that the application ought to be refused.

Respectfully submitted.

S. WARBURTON,
Attorney for Defendant in Error.